FILED
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NO.

IN THE
Supreme Court of the United States

LLOYD E. HUMPHREYS AND
HUMPHREYS & ASSOCIATES LAW FIRM, P.C.,
Petitioners,

vs.

CHARLES MEADOWS

Petition For Writ of Certiorari
To The Texas Supreme Court & Court of Appeals
For the Second District of Texas, Fort Worth, Texas

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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6-1 PP

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Court of Appeals
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-98-369-CV

LLOYD E. HUMRHREYS ANDAPPELLANTS
HUMPHREYS & ASSOCIATES
LAW FIRM, P.C.

V,

CHARLES MEADOWSAPPELLEE

FROM THE 67TH DISTRICT COURT OF TARRANT COUNTY

CONCURRING OPINION

I concur with the majority's conclusion that established case authority requires that we affirm. I write separately to express my hope that the Texas Supreme Court might use this case to reconsider its holding in *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (TEX 1995). *Peeler* prevents convicted defendants from recovering damages for what would otherwise be compensable acts of malpractice by defense counsel. While application of this bright-line rule may work well in most cases, the facts alleged by the appellant Lloyd E. Humphreys in the instant case arguably support the conclusion that the rule should not apply in all such cases.

Application of the *Peeler* rule places Humphreys in a proverbial "Catch-22": Humphreys alleges facts that, on their face, show that he would not have been convicted in his federal trial had defense counsel not made a significant mistake concerning the need for a trial objection when it was learned that one of the persons serving on the jury was a convicted felon. But the very circumstance that makes the mistake so significant – the resulting conviction – also

prevents Humphreys from maintaining his cause of action. I agree this seemingly strange result is required under current law; however, I would urge that the rule in the *Peeler* be narrowed so as to achieve the laudable goal of preventing frivolous suits by convicted defendants, but at the same time, provide a remedy to defendants who are truly the victims of legal malpractice.

/s/ David L. Richards
David L. Richards
JUSTICE

Court of Appeals
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-98-369-CV

LLOYD E. HUMRHREYS AND HUMPHREYS & ASSOCIATES LAW FIRM, P.C. — APPELLANTS

V.

CHARLES MEADOWS — APPELLEE

FROM THE 67TH DISTRICT COURT OF TARRANT COUNTY

OPINION

Lloyd E. Humphreys and Humphreys & Associates Law Firm, P.C. (collectively, Humphreys) appeal a summary judgment in favor of Charles Meadows (Meadows) dismissing Humphrey's claim for legal malpractice based on Meadow's representation of Humphreys in Humphrey's trial for federal tax evasion. Because Humphreys was convicted of tax evasion and has not shown that he was exonerated on appeal or otherwise, we will affirm.

Humphreys was convicted in a federal district court in Iowa on five counts of tax evasion. The Eighth Circuit Court of Appeals affirmed the convictions. *See United States v. Humphreys*, 982 F.2d 254, 257, 262 (8th Cir. 1992) *cert. Denied*, 519 U.S. 1042 (1993). In addition, the federal court denied Humphreys any post-conviction relief. *See Humphreys v. United States*, 89 F.3d 840 (8th Cir.) *cert. Denied*, 519 U.S. 1042 (1996). In the instant case, Humphreys alleges that Meadows-his criminal defense attorney-negligently represented him and that Meadow's negligence was the proximate cause of Humphrey's criminal conviction. The trial court granted summary

judgment in favor of Meadows based on *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995), which held that a convicted criminal could not sue her criminal defense attorney for malpractice because the convict's criminal conduct was the sole proximate cause of the conviction. *Id.* At 497-98.

To prevail on his legal malpractice claim, Humphreys must prove that: (1) Meadows owed him a duty, (2) Meadows breached the duty, (3) the breach proximately caused Humphreys' injuries, and (4) Humphreys sustained damages. *See id.* At 496; *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Texas. 1989) (op. on reh'g). A defendant is entitled to summary judgment if the summary judgment evidence establishes, as a matter of law, that at least one element of a plaintiff's cause of action cannot be established. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). To accomplish this, the defendant-movant must present summary judgment evidence that negates an element of the plaintiff's claim. Once this evidence is presented, the burden shifts to the plaintiff to put on competent controverting evidence that proves the existence of a genuine issue of material fact with regard to the element challenged by the defendant. *See Centrq Realty, Inc. v. Siegler*, 899 SW2d 195, 197 (Tex. 1995).

In *Peeler*, the supreme court explained that the "public policy prohibits convicts from profiting from their illegal conduct." *Peeler*, 909 S.W.2d at 498. Moreover, "allowing civil recovery for convicts impermissibly shifts responsibility for the crime away from the convict." *Id.* Thus, the supreme court held that "plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction *only if* they have been exonerated on direct appeal, through post-conviction relief, or otherwise." *Id.* At 497-98 (emphasis supplied).

Humphreys' conviction was affirmed on appeal, and he did not succeed in obtaining post-conviction relief. Therefore, his "illegal acts remain the sole proximate and producing causes of (his) indictment and conviction as a matter of law." *Id.* At 498.

We affirm the trial court's summary judgment.

/s/ John Cayce
John Cayce
Chief Justice

PANEL A: CAYCE, C.J.; LIVINGSTON and RICHARDS, J.J.

RICHARDS, J. filed a concurring opinion.

DO NOT PUBLISH
TEX. R. APP. P. 47.3(a)

MAR 9 2000

Court of Appeals
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-98-369-CV

Lloyd E. Humphreys and Humphreys & Associates Law Firm, P.C.	§	From the 67th District Court of Tarrant County
	§	(67-149957-93)
	§	
	§	March 9, 2000
v.		
	§	Opinion by Chief Justice Cayce
	§	Concurrence by Justice Richards
Charles Meadows	§	(nfp)

JUDGMENT

This court has considered the record on appeal in this case and holds that there was no error in the trial court's judgment. It is ordered that the judgment of the trial court is affirmed.

It is further ordered that appellants Lloyd E. Humphreys and Humphreys & Associates Law Firm, P.C. shall pay all the costs of this appeal, for which let execution issue.

/s/ Jon Barton

Judge Jon Barton
Tarrant County Justice Center
401 W. Belknap
Fort Worth, Texas 76196-0121

July 29, 1998

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RE: Cause Number 67-149957-93
Lloyd E. Humphreys, et al
Vs. Charles Meadows, et al

Counselors:

After review of the briefs and consideration of the arguments, I am persuaded by the Defendant's public policy argument. That is, I feel constrained to follow the *Peeler* decision and hold that Mr. Humphreys' claims against Mr. Meadows are foreclosed by Mr. Humphreys' criminal conviction and lack of post-conviction relief. I further think that the breach-of-fiduciary-duty claims are estopped. Consequently, I am prepared to and will grant total summary judgment to Defendant in this case...in light of the fact that I grant the summary judgment motion in its entirety, I am uncertain as to whether or not I need to rule on the objections and responses to the summary judgment evidence...If Mr. Madsen has not already done so, I request that he prepare an order for signature that grants the summary judgment.

/s/ Jon Barton

NO. 67-149957-93

LLOYD E. HUMPHREYS AND HUMPHREYS AND ASSOCIATES LAW FIRM, P.C.	)IN THE DISTRICT COURT OF)))
VS.	)TARRANT COUNTY, TEXAS)
CHARLES MEADOWS AND MAX WAYMAN	))67TH JUDICIAL DISTRICT

ORDER ON MOTION TO MODIFY
FINAL SUMMARY JUDGMENT

On October 30th, 1998, the above-captioned and numbered cause came on for hearing on the Motion to Modify Final Summary Judgment filed herein by Plaintiffs Lloyd E. Humphreys and Humphreys & Associates Law Firm, P.C. Plaintiffs and Defendant, Charles Meadows, appeared at such hearing by and through legal counsel.

The Court, after considering such Motion to Modify Final Summary Judgment and the response of Defendant thereto and after hearing the arguments of counsel for Plaintiffs and Defendant is of the opinion and finds that said Motion should be denied.

IT IS, THEREFORE, ORDERED AND DECREED that the Motion to Modify Final Summary Judgment of Plaintiffs be, and it is hereby, denied.

SIGNED 30 October, 1998.

/s/ Jon Barton
Judge Presiding

THE SUPREME COURT OF TEXAS
Post Office Box 12248
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April 05, 2001

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Mr. J. Bruce Bennett
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RE: Case Number 00-0555
Court of Appeals Number: 02-98-00369-CV
Trial Court Number: 67-149957-93

Style: LLOYD E. HUMPHREYS and HUMPHREYS & ASSOCIATES LAW FIRM, P.C.
V.
CHARLES MEADOWS

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the
above styled petition for review.

Sincerely,

John T. Adams, Clerk

By /s/ Gena Pelham
Gena Pelham, Deputy Clerk

Cc: Ms. Stephanie Laqvake, Clerk
Mr. Thomas A. Wilder
Rev. Lloyd E. Humphreys

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
TARRANT COUNTY JUSTICE CENTER
401 W. BELKNAP, SUITE 9000
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June 8, 2001

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RE: Court of Appeals Number:02-98-00369-CV
Trial Court Case Number:67-149957-93

Style: Humphreys, Lloyd E., and Humphreys & Associates Law Firm, P.C.
v.
Meadows, Charles

The judgment of this court is final in the above referenced cause. The mandate has this day been issued to the trial court clerk.

Respectfully yours,

Stephanie Lavake, CLERK

By: /s/Rose Mary Flores
Rose Mary Flores, Deputy Clerk

NO. 00-0555

IN THE

SUPREME COURT OF TEXAS

LLOYD E. HUMPHREYS AND

HUMPHREYS & ASSOCIATES LAW FRIM, P.C.

Petitioners

v.

CHARLES E. MEADOWS

Respondent.

WAIVER OF RESPONSE TO PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

Charles Meadows, Respondent, files this waiver of response to Lloyd E. Humphreys and Humphreys & Associates Law Firm, P.C.'s petition for review pursuant to Texas Rule of Appellate Procedure 53.3.

Respectfully submitted,

/s/ Perry J. Cockerell
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

982 F.2d 254 (1992)

No. 95-3455NICR

Lloyd E. Humphreys,	*	
	*	
Appellant,	*	Order Denying Petition
	*	for Rehearing and
v.	*	Suggestion for
	*	Rehearing En Banc
United States of America,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion. The petition for rehearing by the panel is also denied. Judge Hansen took no part in the consideration or decision of this case.

August 8, 1996

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-3455NI

89, F.3d 840 (1996)-(POST CONVICTION RELIEF)

Lloyd E. Humphreys,	*	
	*	
Appellant,	*	Appeal from the
	*	United States
	*	District Court for the
v.	*	Northern District of Iowa.
	*	
United States of America,	*	
	*	
Appellee.	*	[UNPUBLISHED]

Submitted: May 2, 1996

Filed: May 7, 1996

Before FAGG, BOWMAN, and BEAM, Circuit Judges,

PER CURIAM.

"A jury found Lloyd E. Humphreys guilty of tax offenses, and we affirmed his conviction. See *United States v. Humphreys*, 982 F.2d 254 (8th Cir. 1992), cert. Denied, 114 S.Ct. 61 (1993). Humphreys then filed this 28 U.S.C. § 2255 motion, and the district court denied relief without an evidentiary hearing. Humphreys appeals.

Having carefully reviewed the record, we are convinced that Humphreys is not entitled to § 2255 relief. See *United States v. Duke*, 50 F.3d 571, 576 (8th Cir.) (standard of review), cert. Denied, 116 S.Ct. 224 (1995). Some of the grounds asserted in Humphreys' motion were resolved against him on direct appeal and cannot be relitigated here. See *Humphreys*, 982 F.2d at 257-62; *Dall v. United States*, 957 F.2d 571, 572-73 (8th Cir. 1992) (per curiam). Other grounds asserted by Humphreys could have been raised at trial or on direct appeal, but were not, and are thus procedurally defaulted. See *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1988) (per curiam). We reject Humphreys' assertion of ineffective assistance of counsel, both as an independent ground and as cause excusing his default. See *Strickland v. Washington*, 446 U.S. 668, 694 (1984); *Reid v. United States*, 976 F.2d 446, 447-48 (8th Cir. 1992), cert. Denied, 507 U.S. 945 (1993).

Accordingly, we affirm the judgment of the district court."

Pertinent Portions of the Opinion of the United States Eighth Circuit Court of Appeals On Direct Appeal

Pertinent portions of the opinion of the United States Eighth Circuit Court of Appeals on Direct Appeal, dated December 7, 1992, are as follows: (Judge David Hansen did not participate because he had been the trial judge.)

"D. Juror Disqualification

At trial, the court's voir dire questioning revealed that one of the jurors had been convicted thirty-one years earlier on an embezzlement charge. Subsequent to entry of the verdict, Humphreys discovered that the juror's civil rights had not been restored. Humphreys then brought a motion for a new trial, claiming statutory disqualification of the juror...It is abundantly

clear from the record that the juror was operating under a good faith belief that he was at all times a qualified juror, and that he did not fear retaliation from the government if he voted for acquittal...

Failure to have one of the juror qualifications set forth at 28 U.S.C. § 1865(b) should not necessarily render an individual fundamentally unfit to serve. Rather, it should serve as a basis for challenge to the person's qualifications.[5] We are in agreement with the recent holding of the District of Colombia Circuit Court of Appeals, in which the court stated:

> The Sixth amendment right to an impartial jury does not require an absolute bar on felon-jurors. The touchstone of he guarantee of an impartial jury is protection against juror bias. A per se rule would be appropriate only if one could reasonably conclude that felons are always biased against one party or another. Congress' purpose in restricting, in 28 U.S.C. 1965-67, jury service by felons seems to stem from considerations other than a concern about biased jurors. More important, a per se rule in this context seems inconsistent with the hostility expressed in *McDonough Power Equipment Inc. v. Greenwood*, 464 U.S. 548 (1984), to unnecessary new trials and to the axiom that a defendant is entitled to a fair trial but not a perfect one. We think, therefore. that that Sixth Amendment does not require automatic reversal of every conviction reached by a jury that included a felon.

United States v. Boney, _____ F.2d _____ (D.C. Cir. 1992) 1992 WL 267481.

---

[5] See Ford v. United States, 201 F.2d 300 (5th Cir. 1953).

It is the defendant's duty to investigate, the question, and to assert a challenge prior to the return of the verdict. If actual bias or prejudice is revealed, an obvious challenge for cause is timely presented. If not, the court may still determine the necessity of taking remedial action, such as the seating of an alternate juror. In an effort to obtain a new trial, it is incumbent upon the defendant to clearly demonstrate that the juror's lack of qualifications presented actual bias or prejudice, affecting the juror's impartiality and impacting the fairness of the trial.[6] A challenge after the verdict without such a showing comes too late.[7]

Humphreys' challenges fails in both respects. Humphreys did not pursue any questioning of the juror on voir dire, nor did he further investigate or raise any challenge during trial. Having failed to diligently and timely discover the relevant information, he is precluded from being heard on the issue of juror qualification. At the conclusion of the hearing on Humphreys' motion, the district court specifically found that there was no evidence of either bias or unfairness as a result of the seating of this juror. This conclusion is

---

[6] In those cases addressing a challenge for cause based upon bias or prejudice, the Court has stated:

> To obtain a new trial...a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of the trial.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984).

[7] See Shotwell Manufacturing Co. v. United States, 371 U.S. 341 (1963), where an objection to the petit jury array brought four years after the verdict was returned was not timely, the relevant information was available before entry of the verdict through due diligence, and no prejudice was shown.

not clearly erroneous and we have no inclination to set it aside. See *United States v. Miscellaneous Firearms & Ammunition*, 945 F.2d 239 (8th Cir. 1991). The court did not abuse its discretion in refusing to grant Humphreys' motion for a new trial.

Pertinent Portions of the Government Brief from The Direct Appeal

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. CR 90-9
	)	
vs.	)	
	)	
LLOYD E. HUMPHREYS,	)	**ORDER**
	)	
Defendant.	)	

The matter before the court is the defendant's motion for relief from judgment. The court notes that the defendant has now appealed this matter to the Eighth Circuit Court of Appeals. In addition, the court finds that there is no merit in the motion for relief from judgment.

IT IS THEREFORE ORDERED that the defendant's motion for relief from judgment is denied.

Done and Ordered this 23rd day of February, 1996.

Pertinent portions of the Government Brief from the Direct Appeal on the performance of defense counsel at trial state:

(A) "Defendant did not preserve the severance issue...In order to preserve a rule in motion on appeal, the motion must be renewed at the close of the evidence. *U.S. v. Sanchez-Lopez*, 879 F.2d 541, 551 (9th 1989). Failure to renew the motion

results in a waiver of this issue...In the instant case, defendant did not renew the motion to sever at the close of the Government's case (TR 6, 1356-1358) or al the close of all the evidence (TR 8, 1722-1724). Accordingly he has waived this issue and it should not be reviewed on appeal." (Brief of Appellee, No. 91-3812, U.S. Court of Appeals, Eighth Circuit, pp. 25, 26).

(B) "Defendant did not preserve the venue issue in the Court below...and the renewed motions were denied because Defendant did not timely invoke any right to transfer under § 3237(b)...Having failed to preserve this issue in the Court below Defendant cannot raise it here for the first time." (Id. Pp.29,30.)

(C) "In his motion for new trial in the Court below there was no claim made that Mr. Heskett was biased against the Defendant...Defendant did not ask any voir dire questions...and did not seek to challenge Mr. Heskett for cause based on a claim of bias. Obviously, if Defendant felt that the conviction itself was cause to challenge Mr. Heskett, he would have done so...It is Defendant's duty to discover any lack of qualification during voir dire, or from some other source and, if there is no showing of actual bias or prejudice, a challenge to a juror's qualifications comes too late if not asserted until after the verdict...Indeed, it is inexplicable why Defendant made no inquires during the two-week trial, but evidently inquired only two days after his conviction. Just as an objection to the entire petit jury array comes too late after a verdict is returned, especially when the relevant information was available through due diligence before the entry of the verdict...so too does an objection to an individual juror come too late when raised pos-verdict...Defendant's claim is too late." (Id. 40-43)

(D) Defendant made no objections to Instructions 5, 6, 7, or 22 in the trial court (TR 9, 1782-1797). He cannot raise issues regarding these instructions for the first time on appeal...He did not object to instructions on this ground in the Court below and cannot raise it for the first time on appeal. (Id. 44-46).

CONSTITUTION OF THE UNITED STATES

ARTICLE I.

Section 9. Restrictions on powers of Congress.

No Bill of Attainder or ex post facto Law shall be passed.

ARTICLE IV.

Section 2. Privileges and Immunities of citizens; surrender of fugitives from other states. The citizens of each State shall be entitles to all Privileges and Immunities of Citizens in the several states.

ARTICLE VI.

Constitution, federal laws and treaties control state constitutions and laws; oath of federal and state officers to support constitution; religious tests as qualification to office or trust.... This Constitution, and the Laws of the United States, which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, an Think in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT VI.

...to have the Assistance of Counsel for his defense.

AMENDMENT VII.

Trial by jury in civil cases. In Suites at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT IX.

Rights retained by people. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV.

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS CONSTITUTION

ARTICLE 1

§3 Equal Rights.

Free men, when they form a social compact, equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments. Privileges, but in consideration of public services.

§4 Equality Under the Law.

Equality under the law shall not be denied or _____because of sex, race, color, creed, or _____origin. This amendment is self-operative.

§13 Prohibitions Against Excessive Bail fines and Against Cruel or Unusual Punishment; Open Courts; Remedy by Course of Law.

All courts shall be open, and every person for any injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

§15 Right to Jury Trial.

The right of trial by jury shall remain inviolate. Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

§19. Deprivation of Life, Liberty, Etc.: Due Course of Law.

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

ARTICLE 5

§2. Supreme Court; justices; sections; eligibility; election; vacancies

...Said Justices shall be elected (three of them each two years) by qualified voters of the state at a general election; shall hold their offices six years, or until their successors are elected and qualified; and shall each receive such compensation as shall be provided by law.

§ 15. County Court; County Judge

...there shall be elected in each county, by the qualified voters, a County Judge, who shall be well informed in the law of the State;

§ 7. Judicial Districts; District Judges; terms or sessions; absence, disability or disqualification of Judge

...Each district judge shall be elected by the qualified voters at a General Election and shall be a citizen of the United States and of this State, who is licensed to practice law in this State and has been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election, who has resided in the district in which he was elected for two (2) years next preceding his election, and who shall reside in his district during his term of office and hold his office for the period of four (4) years, and who shall receive for his services an annual salary to be fixed by the Legislature.

TEXAS STATUES

§ 71.031. Act or Omission Out of State

(a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country my be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country if:

(1) A law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

SUBCHAPTER A. PROPORTIONATE RESPONSIBILITY

§ 33.001. Proportionate Responsibility

In an action to which this chapter applies, a claimant may not recover damages if his percentage of responsibility is greater than 50 percent.

§ 33.002. Applicability

(a) ..., this chapter applies to any cause of action based on tort in which a defendant, settling person, or responsible third part is found responsible for a percentage of the harm for which relief is sought.

(b) Notwithstanding Subsection (a), a defendant who, with the specific intent to do harm to others, acts in concert with another person to engage in the conduct described in the following sections of the Penal Code shall be jointly and severally liable with such other person for the damages legally recoverable by the claimant that were proximately caused by such conduct.

(c) Nothing in this section shall require a submission to the jury of a question regarding conduct by any part absent sufficient evidence to support the submission.

§ 33.003. Determination of Percentage of Responsibility

The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following person s with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these

§ 33.012. Amount of Recovery

(a) If the claimant is not barred from recovery under Section 33.001, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility.

(b) If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a credit equal to one of the following, as elected in accordance with Section 33.014:

§ 33.013. Amount of Liability

(a) Except as provided in Subsections (b) and (c), a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed.

(b) Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if the percentage of responsibility attributed to the defendant is greater than 50 percent.

Canon 4. Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict With Judicial Obligations

D. Financial Activities.

(1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. This limitation does not prohibit either a judge or candidate from soliciting funds for appropriate campaign or office-holder expenses as permitted by state law.

MEADOWS, OWENS, COLLIER, REED & COGGINS
ATTORNEYS AT LAW
3700 NCNB Plaza
901 Main Street
Dallas, Texas 75202
(214) 744-3700

March 15, 1991

PERSONAL AND CONFIDENTIAL

Mr. Lloyd "Buck" Humphreys
P.O. Box 8300-257
Dallas, Texas 75205

Re: Revised Fee Agreement, U.S.A. v. Humphreys,
No. CR. 90-0009

This letter supercedes the Fee Agreement Letter dated February 8, 1991, which was duly executed by you on February 14, 1991, and contains the terms upon which the firm of Meadows, Owens, Collier, Reed & Coggins (the "Firm") has agreed to represent you with respect to the charges filed against you in the above-mentioned criminal tax case currently pending in Iowa. Our representation covers only this single criminal action...Our current hourly rates range from $250 for Chuck Meadows, our most senior lawyer, and $210 for Paul Coggins, to approximately $60 for our legal assistants...You have agreed to place in the Firm's trust account Fifty Thousand Dollars ($50,000) as security for the prompt payment of services rendered...we estimate your total legal costs for the pre-trial and trial stages to be One Hundred Thousand ($100,000) to One Hundred and Fifty Thousand Dollars ($150,000);...We have agreed that, prior to trial, we will review the retainer and reach a new trust sum to be deposited with the Firm...You will also be billed for any out-of-pocket expenses incurred by the Firm in connection with

your matter...Finally, the Supreme Court of Texas requires that all attorneys in Texas follow the attached "Texas Lawyer's Creed" and that each client be advised of the contents of this Creed when undertaking new representation. If you have any questions regarding this attachment, please do not hesitate to call us...I have enclosed an additional copy of this letter for your files.

II. Lawyer to Client

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate legal means to protect and advance the clients legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear or judicial disfavor or public unpopularity, nor be influenced by mere self-interests.

2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.

3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

Syllabus

FERRI *v.* ACKERMAN

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

NO. 78-5981. Argued October 2, 1979—Decided December 4, 1979

A. Federal District Court, pursuant to the Criminal Justice Act of 1964, appointed respondent attorney to represent petitioner, an indigent defendant, in a federal criminal trial. After petitioner was convicted and pending his unsuccessful appeal, he sued respondent in a Pennsylvania state court for alleged malpractice in respondent's conduct of the federal criminal trial. The trial court dismissed the complaint on the ground that respondent was immune from liability. The Pennsylvania Supreme Court affirmed, resting its decision on federal law and holding that the justification for judicial immunity embraced in the federal system and encompassing prosecutors and grand jurors, as well as judges, was equally applicable to defense counsel as participants in judicial proceedings.

Held: An attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by his former client. Pp. 199-205.

(a) There is nothing in the language, the legislative history, or the basic purpose of the Criminal Justice Act of 1964 in providing compensation for court-appointed attorneys to support the conclusion that Pennsylvania must accept respondent's claim of immunity from liability for a state tort. The fact that respondent was compensated from federal funds is not a sufficient basis for interring that Congress intended to grant him immunity from malpractice suits. Pp. 199-201.

(b) The primary rationale for granting immunity to judges, prosecutors, and other public official-namely, the societal interest in providing such officials with the maximum ability to deal fearlessly and impartially with the public at large—does not apply to court-appointed defense counsel sued for malpractice by his own client. In contrast to other officers of the court, the primary office performed by appointed counsel parallels the office of privately retained counsel. Although appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client, and, indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. Pp. 202-204.
483 Pa. 90, 394 A.2d 553, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Julian N. Eule, by appointment of the Court, 440 U.S. 970, argued the cause and filed briefs for petitioner.

John P. Arness argued the cause for respondent. With him on the brief were *David J. Hensler*, *Allen R. Snyder*, and *Ned J. Nakles*.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question is whether an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is, as a matter of federal law, entitled in a federal criminal trial is, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by his former client.

On August 28, 1974, a federal grand jury for the Western District of Pennsylvania named a petitioner as a defendant in five counts of a nine-count federal indictment alleging that he had participated in a 1971 conspiracy to construct and use a bomb in violation of various federal statues.[1] In due course, the District Court appointed respondent to serve as Petitioner's counsel pursuant to the Criminal Justice Act of 1964.[2] Respondent represented petitioner during pretrial proceedings and a 12-day trial. The jury found petitioner guilty on all counts; the judge imposed a sentence of 20 years on the conspiracy and bombing counts and an additional 10 years on the counts charging violations

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[1] The relevant sections, codified in the Criminal Code and the Internal Revenue Code, are: 18 U.S.C. §§ 2, 371, 844 (i); 26 U.S.C. §§ 5821, 5822, 5861, 5871.

[2] 18 U.S.C. § 3006.A. The record indicates that petitioner had previously been represented by two other lawyers. An action against the first for malpractice is still pending; the second was permitted to withdraw when respondent was appointed to represent petitioner.

of the Internal Revenue Code. The judgments of conviction were affirmed summarily by the Court of Appeals for the Third Circuit.[3]

While that appeal was pending, on March 4, 1976, petitioner filed a "complaint in negligence" against respondent in the Court of Common Pleas for Union County, Pa.[4] The complaint described 67 different instances of alleged malpractice in respondent's conduct of the federal criminal trial and prayed for the recovery of substantial pecuniary damages.[5] Respondent filed a demurrer, asserting that the complaint failed to state a cause of action and that respondent was immune from any civil liability arising out of his conduct of petitioner's defense.

Petitioner thereafter filed a "Traversal Brief" in which he argued that the sufficiency of the malpractice complaint was

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[3] *United States v. Ferri*, 546 F.2d 419 91976).

[4] Because venue was improper, the case was later transferred to the Court of Common Pleas for Westmoreland County.

[5] The prayer is somewhat ambiguous. For example, in one paragraph, petitioner, suing on behalf of his former wife as well as himself, asked for "double and contingent damages sustained as a direct result from the expenditure of funds and anxieties endured in the amount of Six Hundred Thousand Dollars ($6,000,000.oo) (sic) jointly and or severally as compensation for all." App. 20. His former wife, however, wrote to the clerk demanding that she be withdrawn as a plaintiff in what she characterized as "an abhorrent action." *Id.*, at 23.

supported by various sections of the Pennsylvania Rules of Civil Procedure and the Pennsylvania Constitution.[6] In that brief petitioner added a claim that respondent had negligently failed to plead the statute of limitations as a bar to the Internal Revenue Code counts of the indictment.[7]

Without ruling on its sufficiency, the Court of Common Pleas, sitting en banc, dismissed the complaint on the ground that decided cases and strong public policy required that a lawyer appointed to represent an indigent defendant in a federal trial must be immune from liability for damages. The court cited one Pennsylvania case[8] but relied primarily on federal authorities for its conclusion.[9] By a divided vote, the Pennsylvania Supreme Court

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[6] See *id.*, at 31.

[7] Petitioner's claim is that the 3-year statute of limitations contained in 26 U.S.C. § 6531 applies to the Internal Revenue Code counts. A 5-year period applies to the other counts. 18 U.S.C. § 3282. According to the indictment, the bombing occurred on August 26, 1971. the indictment was filed on August 28, 1974. Absent any tolling, petitioner asserts that the Internal Revenue Code counts were therefore time barred. Because of the failure by respondent (or either of petitioner's two previous lawyers, see n. 2, *supra*) to plead the statute of limitations prior to trial, petitioner may be subject to an additional 10 years in prison. The Court of Appeals for the Third Circuit rejected the statute-of-limitations argument in its unpublished order, since it was raised for the first time on appeal. See App. 39. It is our understanding that the validity of the additional 10-year sentence has not yet been determined in any collateral proceeding.

[8] *Reese v. Danforth*, Lancaster County, 131 June Term, 1976, aff'd *per curiam*, 241 Pa. Super. 604, 360 A.2d 629 (1976) (holding county public defenders immune from state malpractice suits). That case was reversed by the Supreme Court of Pennsylvania after we heard oral argument in this case. 486 Pa. 479, 406 A.2d 735 (1979).

[9] The court also declined to rule on respondent's contention that the state court had no jurisdiction in an action based on ineffective assistance of counsel in a federal court because that issue could be raised on direct appeal in the criminal case or by way of collateral attack on the conviction. See App. 42.

affirmed the order of dismissal, squarely resting its decision on federal law.

Because the case concerned a claim of immunity by a participant in a federal proceeding, the Pennsylvania Supreme Court believed that it was required to look to federal law to determine whether immunity exists and, if so, its nature and scope.[10] After reviewing federal cases holding that the common-law doctrine of judicial immunity has been embraced in the federal system and encompasses prosecutors and grand jurors as well as judges, the court concluded that the justification for immunity-the concern that the threat of harassment by unfounded litigation might impair the public officer's performance of his official duties-was equally applicable to defense counsel as participants in judicial proceedings. The court held that the privilege was absolute and therefore applied even to a claim of gross negligence and even though the allegation of malpractice did not concern an exercise of counsel's discretion.

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[10] "Since we are here concerned with an asserted immunity protecting a participant in a federal legal proceeding, we are required to look to the federal law to determine whether it exists and if it does, its nature and scope. *Howard v. Lynons*, 360 U.S. 593...(1959). *See also Carter v. Carlson*, 144 U.S. App. D.C. 388, 391-392, 447 F.2d 358, 361-62 n. 5 (1971); *Chandler v. O'Bryan*, 445, F.2d 1045, 1055 (10th Cir. 1971); *Garner v. Rathburn*, 346 F.2d 55, 56 (10th Cir. 1965). As noted by the United States Supreme Court in *Howard v. Lyons, supra*, the very nature of a ruling of privilege requires reference to the law of the sovereign creating it for a determination of its nature and scope." 483 Pa. 90, 93, 394 A.2d 553, 555 (1978).

The two dissenting justices agreed that federal law was applicable, but regarded appointed counsel as more analogous to privately retained counsel than to a federal officer such as a prosecutor. Because those who can afford to retain counsel of their own choosing have a remedy for malpractice, the dissenters felt that the denial of a comparable remedy for the indigent would establish a lower standard of care for appointed counsel.

The narrow issue presented to this Court is whether federal law in any way pre-empts the freedom of a State to decide the question of immunity in this situation in accord with its own law. We are not concerned with the elements of a state cause of action for malpractice and need not speculate about whether a state court would consider petitioner's allegations sufficient to establish a breach of duty or a right to recover damages.[11] Nor are we concerned with the question whether Pennsylvania may conclude as a matter of state law that respondent is absolutely immune.[12] For when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law. U.S. Const., Art. VI, cl. 2.

For the purposes of our analysis, it is appropriate to assume that petitioner is entitled to prevail as a matter of state law, and to ask whether federal law requires a State to accept respondent's defense of absolute immunity. We may begin the inquiry by noting that there are separate federal interests that arguably could support the application of a separate federal rule in cases of this kind. A federal statute provided the basis for respondent's appointment and compensation, and he participated in a federal judicial proceeding

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[11] Cf. *Walker v. Kruse*, 484 F.2d 802 (CA7 1973).

[12] See *Reese v. Danforth*, 486 Pa. 479, 406 A.2d 735 (1979); n. 8, *supra*.

as an "officer" of the federal court. The identification of those federal interests does not, however, demonstrate that an applicable federal rule of law has been adopted by Congress or recognized by this Court.[13] We therefore must consider whether respondent's immunity claim is supported by (1) the enactment of the Criminal Justice Act of 1964 or (2) our cases considering the immunity of federal officers for the performance of their assigned duties.

Opinion of the Court

I

The Criminal Justice Act of 1964 was enacted to provide compensation for attorneys appointed to represent indigent defendants in federal criminal trials.[14] In response to evidence that

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[13] When federal law is the source of the plaintiff's claim, there is a federal interest in defining the defenses to that claim, including the defense of immunity. See, *e.g. Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404; *Imbler v. Pachtman*, 424 U.S. 409, 417-419; *Pierson v. Ray*, 386 U.S. 547, 554; *Tenney v. Brandhove*, 341 U.S. 367, 376. That interest, of course, is not present in a case, such as this, arising under state law.

[14] As amended in 1970, the rates of compensation are $30 per hour for time expended in court and $20 per hour for time reasonably expended out of court (or the minimum hourly rate established by a bar association in the district, whichever is lower), plus reimbursement for expenses reasonably incurred. The maximum compensation may not exceed $1,000 for an attorney in a felony case or $400 where only misdemeanors are charged. 18 U.S.C. §§ 3006A (d) (1), (2).

unpaid appointed counsel were sometimes less diligent or less thorough than retained counsel,[15] Congress concluded that reasonable compensation would improve the quality of the representation of indigents. Although it might well have been suggested that a statutory immunity would be helpful in inducing counsel to accept representation of indigent defendants, there is nothing in the statute itself or in its legislative history to indicate that Congress ever considered-much less actually intended to implement-any such suggestion. Indeed, Congress' attempt to minimize the differences between retained and appointed counsel[16]

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[15] See H.R. Rep. No. 864, 88th Cong., 1st Ses., 6 (1963); S. Rep. No. 346, 88th Cong., 1st Sess., 2 (1963); 110 Cong. Rec. 454 (1964) (remarks of Rep. Fraser); Hearings on S. 63 et al. before the Senate Judiciary Committee, 88th Cong., 1st Sess. 249 (1963).

[16] Congress clearly wanted appointed counsel to share as much of retained counsel's characteristic independence from the Government as was possible notwithstanding the Government subsidy. This is borne out by the debate over whether to include the establishment of full-time public defender. The House bill did not, at least partly out of fear that full-time public defenders would be too closely identified with the Government's efforts to separate the guilty from the innocent, and that there would be a risk of institutional reluctance adequately to defend the guilty. See 110 Cong. Rec. 18558 (1964) (remarks of Rep. Moore, author of the bill): "The Senate bill, in addition to authorizing the appointment of private counsel, would have empowered the Federal Government to establish Federal public defender offices in any or all of the judicial districts throughout the country. This would have had the effect of placing the administration of justice totally in the hands of the Federal Government. An individual accused of a crime, would have been tried before a Federal judge, prosecuted by a Federal District attorney, and defended by a Federal public defender. Thus, the total right to a fair trial and to the preservation of one's right to liberty would be solely dependent upon men appointed by the Federal Government and compensated out of the Federal Treasury.

"This condition could have easily have led to the establishment of totalitarian justice with the well-known unfairness and inequities found in totalitarian states. In addition, this condition could have severely undermined the duties and responsibilities of members of the bar who I believe are under an obligation to defend individuals, even those without funds and even (those) charged in an unpopular cause. The burdens of preserving a healthy society have been gradually eroded in recent years through too great a dependence upon the Federal Government. It did not

is more consistent with the view that Congress intended all defense counsel to satisfy the same standards of professional responsibility and to be subject to the same controls.[17]

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seem desirable to a majority of the Members of the House to further this erosion. The House bill, then adopted a philosophy totally different from that reported in the Senate."

See also *id.*, at 445 (remarks of Rep. Moore); *id.*, at 445 (remarks of Rep. McCulloch); Hearings on H.R. 1027 et al. before Subcommittee No. 5 of the House of Judiciary Committee, 88th Cong., 1st Sess., 110 (1963).

The House view prevailed at the conference, and the 1964 version of the Act contained no provision for public defenders. In 1970, after a study of the need for public defenders, particularly in the larger districts, Congress amended the Criminal Justice Act to permit the establishment of public defenders to supplement individual appointments of defense counsel. We have found nothing in the legislative history of the 1970 amendments that indicates Congress intended public defenders to be immune from malpractice actions.

[17] AS THE CHIEF JUSTICE noted several years ago, "defense counsel who is appointed by the court...has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer." Burger, Counsel for the Prosecution and Defense-Their Roles Under the Minimum Standards, 8 Am. Crim. L.Q. 2, 6 (1969). See also ABA Project on Standards for Criminal Justice, Defense Function § 3.9)App. Draft 1971).

Respondent argues that there are valid policy reasons that justify an immunity for appointed counsel not accorded privately retained counsel. The claim is that a defendant's relationship with appointed counsel is substantially different than it would be with retained counsel because of the inability to choose and freely to discharge counsel. See, *e.g.* Criminal Justice Act Plan for the Western District of Pennsylvania § IV A (3). The defendant would therefore tend to perceive appointed counsel as a representative of the government and to view him with suspicion. After conviction, a defendant' inevitable bitterness would lead to a high risk of retaliatory lawsuits, the same fear that underlies immunity for judges and prosecutors. *Butz v. Economou*, 438 U.S. 478, 510. Further, because of the increased risk of malpractice actions, appointed counsel would be more susceptible to pressure from clients to call additional witnesses or to make additional arguments that would in fact prejudice the defendant's own case. But respondent has not directed our attention to any empirical data-in judicial decisions, legislative hearings, or scholarly studies-to support his conclusions that the risk of malpractice litigation deters members of the private bar from accepting the representation of indigent defendants or adversely affects the quality of representation. Given the speculative,

The fact that the federal funds provided the source of respondent's compensation is not a sufficient basis for inferring that Congress intended to grant him immunity from malpractice suits. Countless private citizens are the recipients of federal funds of one kind or another, but Congress surely did not intend that all such recipients would be immune for actions taken in the course of expending those funds.

In sum, we find nothing in the express language, the history, or the basic purpose of the Criminal Justice Act of 1964, to support the conclusion that Pennsylvania must accept respondent's claim of immunity from liability for a state tort.

II

Without relying on an explicit statutory grant of immunity, this Court has held that various federal officers, such as a captain in the United States Navy and the Postmaster General, [18] are entitled to immunity from liability for certain claims arising out of the performance of their official duties. The immunity recognized in those cases may be appropriately characterized as an incident of the federal office.

In a sense, a lawyer who is appointed to represent an indigent defendant in a federal judicial proceeding is also a federal officer. Since other federal officers-the judge, the prosecutor, and the grand jurors-enjoy immunity by virtue of their office, arguably that immunity should be shared by appointed counsel. There is, however, a marked difference between the nature of counsel's

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though not implausible, nature of respondent's arguments, we are unwilling to ascribe to Congress an intent to accord an immunity to appointed counsel not given retained counsel in the face of the silent legislative history on this point.

[18] *Howard v. Lyons*, 360 U.S. 593; *Spalding v. Vilas*, 161 U.S. 483; *Kendall v. Stokes*, 3 How. 87.

responsibilities and those of other officers of the court.[19] As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal

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[19] Writing for the Court in *In re Griffiths*,413 U.S. 717, 728-729, Mr. JUSTICE POWELL responded to the argument that a lawyer is comparable to other holders of governmental office as follows:

"We note at the outset that this argument goes beyond the opinion of the Connecticut Supreme Court, which recognized that a lawyer is not an officer in the ordinary sense. 162 Conn. (249) 254, 294 A.2d (281) 283 ((1972)). This comports with the view of the Court, expressed by Mr. Justice Black in *Cammer v. United States*, 350 U.S. 399 (1956):

"It has been stated many times that lawyers are "officers of the court." One of the most frequently repeated statements to this effect appears in *Ex parte Garland*, 4 Wall. 333, 378. The Court pointed out there, however, that an attorney was not an "officer" within the ordinary meaning of that term. Certainly nothing that was said in *Ex parte Garland* or in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important thought it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The work "officer" as it has always been applied to lawyers conveys quite a different meaning from the word "officer" as applied to people serving as officers within the conventional meaning of that term.' *Id.*, at 405 (footnote omitted)."

interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity.[20] The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.

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[20] As Mr. Justice Harlan wrote in his opinion in *Barr v. Matteo*, 360 U.S. 564, 571-572:

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suites in respect of acts done in the course of those duties-suites which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others , or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so that it is impossible to know whether the claims is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interests calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be meads of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . .'*Gregoire v. Biddle*, 177 F.2d 579, 581."

In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of he effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. The fear that an unsuccessful defense of criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently.[21] The primary rationale for granting immunity to judges, prosecutors, and other

[21] There is no claim that retained counsel are rendered immune from malpractice actions by virtue of their participation in federal criminal trials.

public officers does not apply to defense counsel sued for malpractice by his own client.[22]

It may well be true, as respondent argues, that valid policy reasons might justify an immunity for appointed counsel that need not be accorded to privately retained counsel. See n. **17**, *supra*. Perhaps the most persuasive reason for creating such an immunity would be to make sure that competent counsel remain willing to accept the work of representing indigent defendants. If their monetary compensation is significantly less that that of retained counsel, and if the burden of defending groundless malpractice claims and charges of unprofessional conduct is disproportionately significant, it is conceivable that an immunity would be justified by the need to preserve the supply of lawyers available for this important work. Whether a sufficient need can be demonstrated that would justify such a rule, or whether such a problem might be better remedied by adjusting the level of compensation, are questions that can most appropriately be answered by a legislative body acting on the basis of empirical data. Therefore we do not evaluate those arguments. Having concluded that the essential office of appointed defense counsel is akin to that of private counsel and unlike that of a prosecutor, judge, or naval captain, we also conclude that the federal officer immunity doctrine explicated in cases like *Howard v. Lyons*, 360 U.S. 593, and *Butz v. Economou*, 438 U.S. 478, is simply inapplicable in this case. Accordingly, without reaching any question concerning the power of Congress to create immunity for court-appointed counsel in a state malpractice suit brought by his former client.

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[22] Our discussion is confined to immunity in malpractice actions. We do not address the question whether defense counsel is immune from other kinds of tort suits such as a defamation action brought by someone other than his client. Cf. *Butz v. Economou*, 438 U.S., st 512 (dictum).

The judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

In the Matter of Lloyd E. Humphreys.

No. D-3811

Supreme Court of Texas.

Argued Dec. 1, 1993

Decided March 30, 1994

Disciplinary proceeding was brought against attorney, who had been convicted of tax evasion in federal court. On state bar's appeal from adverse rulings of Board of Disciplinary Appeals, the Supreme Court, Cornyn, J., held that: (1) state bar has authority to appeal adverse Board of Disciplinary Appeals rulings to Supreme Court, and (2) federal offense of tax evasion is intentional crime involving moral turpitude, compelling convicted attorney's disbarment.

Attorney disbarred.

...BODA dismissed the State Bar's petition against Humphreys on April 22, 1993, following a February 27 hearing. The OCDC requested that BODA provide written findings of fact and conclusions of law, but BODA declined. Pursuant to TEX.R.Disciplinary P. 7.11 (1992), the OCDC appealed BODA's decision directly to this court.

The State Bar argues that BODA had no power to dismiss the Disciplinary Action, and that BODA is required to disbar Humphreys, Humphreys responds with several arguments...Humphreys claims that he should not be disbarred because his federal criminal conviction was tainted by legal error. Specifically, he alleges that one of the jurors serving on the federal panel that convicted Humphreys was not qualified to serve as a juror because of criminal conviction. Humphreys is correct that a conviction by a Texas criminal court under the circumstances he

alleges would be void. TEX.CODE CRIM. PROC. ANN. Art 35.19 (Vernon 1989); *Tweedle v. State*, 153 Tex.Crim. 200, 212 S.W.2d 846 (1949). But Humphreys was not convicted in a Texas court, and we think it sufficient answer to point out the obvious: Texas criminal procedure does not govern federal criminal trials in Iowa...2. Humphreys also suggests that Texas should not recognize a conviction obtained with the participation of an unqualified juror because such a conviction violated the Jury Trial Clause, Tex. CONST. Art. I, § 15. and the Due Course f Law Clause of the Texas Constitution. TEX. CONST. Art. I, § 19. While the Jury Trial Clause employs different terms than the Seventh Amendment of the United States Constitution, *compare* TEX. CONST. Art. 1, § 15 ("The right of trial by jury shall *remain inviolate*") *with* U.S. CONST. Amend. VII. ("In Suits at common la, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall *be preserved*. (emphasis added), the right Humphreys asserts has a statutory foundation. "TEXCODE CRIM. PROC. ANN. Art. 35.19 (Vernon 1989); *Tweedle v. State*, 218 S.W. 2d 846 (Tex. Crim. App. 1949), "Moreover, the Texas Constitution is irrelevant in this context. The Full Faith and Credit Clause of the United States Constitution, U.S. CONST. art. IV, § I,..Inasmuch as Humphreys' conviction has been found to meet federal procedural standards, it necessarily satisfies the requirements of the Texas Rules of Disciplinary Procedure.3 "the supreme Law of the Land," U.S. CONST. art. VI, cl 2 is controlling... 4.Closely paraphrased, Humphreys' brief states: Lloyd Edwin Humphreys, age 55, has been a lawyer since the age of 23. He graduated from the University of Iowa College of Law Cum Laude and was part of the law review staff. Humphreys was the first

person in thirty years to attend law school and play college football. His honors include three Big Ten Championships, two Rose Bowls, three letters, and All Star recognition. He was president of all his graduating classes in college and school. He was the youngest Chairman of the State Bar Committee and editor of the Federal Practice and Procedure Handbook for the Iowa Bar. He was elected to the Iowa Academy of Trial Lawyers which selects its 225 members by membership vote. He has received many civic awards for distinguished service. He also served his country as the first defense counsel in Vietnam, having volunteered in 1965 as a regular Army officer. He has been approved by his church as a candidate for ministry and has completed several courses in seminary.

Humphreys was never disciplined by a state bar in over thirty years of practice.

In 1984, shortly after he was interviewed to run for Congress, the federal prosecutor and the I.R.S. began investigating him. In February, 1987 twelve armed agents raided Humphreys & Associates Law Firm, P.C. where Humphreys and other attorneys officed with a search warrant. The warrant was issued by a Magistrate who was hired shortly thereafter by his former law firm. The senior partner in this firm was married to Humphreys' ex-wife. (Humphreys alleges the warrant was issued improperly and the search exceeded the scope of the warrant.)

In August, 1990, within days of the statute of limitations expiring, the federal prosecutor in Iowa indicted Humphreys for tax evasion in 1983, 1984, and 1985. This was for less than 5% of his gross income and involved tax returns all prepared by a certified professional accountant who had also been his accountant-bookkeeper with an office within the law firm. The I.R.S. Special Agent later testified Humphreys' books of account were "surprisingly accurate."

The Department of Justice Guidelines for Prosecution required at least three consecutive years of tax deficiencies of at least $2,5000.00 per year. In order to qualify, the I.R.S. moved income from 1984 to 1985; and included property pledged under security agreements as "barter income" from 1983. It also intentionally misrepresented at least one income item.

Carol C. PEELER, Petitioner,

v.

HUGHES & LUCE and Darrell C. Jordan, Respondents.

No. 94-0041

Supreme Court of Texas.

Argued Dec. 14, 1994.

Decided Aug. 1, 1995.

Rehearing Overruled Oct. 27, 1995.

Client who pleaded guilty to federal crime sued her defense attorney and his law firm for violations of the Deceptive Trade Practices Act (DTPA), legal malpractice, breach of contract, and breach of warranty, alleging that she would not have been convicted if immunity offer had been communicated to her. The Fifth Judicial District Court, Dallas County, Frank Andrews, J., granted summary judgment on all causes of action for attorney and law firm. Client appealed. The Dallas Court of Appeals, John Ovard, J., 868 S.W.2d 823, affirmed. Client applied for writ of error. The Supreme Court, Enoch, J., held that: (1) public policy prohibited client from suing defense attorney for malpractice claims did not violate open courts provision, equal protection clause or outlawry provision of State Constitution.

Affirmed.

Hightower, J., filed a concurring opinion.

Phillips, C.J., filed a dissenting opinion in which Gammage and Spector, JJ., joined.

...Jordan and Hughes & Luce moved for summary judgment on Peeler's claims. Among other grounds, Jordan and Hughes & Luce urged the trial court to grant their motion for summary judgment because Peeler's own conduct was the sole proximate or producing cause of her damages, and she did not seek to withdraw her plea or set aside her conviction. On these grounds, the trial court rendered summary judgment with respect to all of Peeler's causes of action. The court of appeals affirmed. 868 S.W.2d at 831. We agree.

III...(2) Generally, to recover on a claim of legal malpractice, a plaintiff must prove that (1) the attorney owed the plaintiff a duty, (2) the attorney breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) damages occurred. *See Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (TEX. 1989). In the context of a criminal matter...we have not addressed whether the client's criminal conduct is, as a matter of law, the sole proximate or producing cause of the client's eventual conviction and damages, such that a legal malpractice claim may not be brought absent a showing that the plaintiff has been exonerated from the criminal conviction, either by direct appeal, post-conviction relief, or otherwise....One court in particular has articulated the public policy considerations at stake: (P)ermitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would allow the criminal to profit by his own fraud, or to take advantage of his own wrong, or to found (a) claim upon his iniquity, or to acquire property by his own crime. As such, it is against public policy for the suit to continue in that it "would indeed shock the public conscience, engender disrespect for courts and generally discredit the administration of justice".

...There are two states that have refused to impose an "innocence requirement" on convicts pursuing malpractice claims against their former attorneys. But they have done so without fully addressing the policy concerns of the jurisdictions that have adopted the innocence requirement. *See Krahn v. Kinney*, 43 Ohio St.3d 103, 105-06, 538 N.E.2d 1058, 1061 (1989); *Gebhart v. O'Rourke*, 444 Mich. 535, 510 N.W.2d 900, 908 (1994). These courts entertain the possibility that a defense attorney's negligence may be the legal cause of a client's damages, treating legal malpractice suits against criminal and civil attorneys exactly alike. *See, e.g. Krahn*, 43 Ohio St.3d at 105-06, 538 N.E.2d at 1061.

....hold that plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise....We therefore hold that, as a matter of law, it is the illegal conduct rather than the negligence of a convict's counsel that is the cause in fact of any injuries from the conviction, unless the conviction has been overturned.

....(4) We emphasize that Peeler, at no time, even asserts that she did not commit the acts which formed the basis of the matters charges. To the contrary, she conceded in her deposition that she committed many of the acts for which she was indicted, but not prosecuted because of the deal she struck.

Accordingly, the trial court properly granted summary judgment for Jordan and Hughes & Luce. To recover either in negligence or under the DTPA, a plaintiff must prove causation.

.....At trial, Peeler also brought claims of breach of contract and breach of warranty, arguing that Jordan and Hughes & Luce's incompetence justifies recovery on those grounds. Since she did not raise any points of error in the court below regarding the trial court's summary judgment against her contract claims, those issues are not before this Court, and we express no opinion about them.

...Nothing in this opinion should be construed as relieving criminal defense attorneys of their responsibility to maintain the highest standards of ethical and professional conduct.

...Striking what we believe is the proper balance between protecting the strong public policies of preventing convicts from escaping the consequences of, or benefiting financially from, their illegal acts and holding defense attorneys responsible for their professional negligence, we affirm the judgment of the court of appeals.

HIGHTOWER, Justice concurring.

...Even though the Court concludes that Peeler's own conduct is the sole proximate or producing cause of her indictment and conviction, the holding today should not be perceived as condoning the alleged conduct of Hughes & Luce and Jordan which, *if true*, is reprehensible and unconscionable.

...PHILLIPS, Chief Justice, delivered a dissenting opinion, joined by GAMMAGE and SPECTOR, Justices.

...The public morality is thus protected at the expense of shielding all criminal defense attorney malpractice, no matter how egregious, from any redress in the civil justice system. While I agree with the Court's approach in those cases where there is some doubt about the effect of the alleged malpractice, I believe it proves too much in those unusual circumstances where the convicted defendant can offer particularly probative evidence but for the attorney's malpractice.

...The Court's position, however, is that any person convicted of a crime must establish his or her innocence in order to maintain a civil malpractice suite. As the Court explains:

> Because of public policy, we...hold that plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise.

Supra, at 497. To support this absolutist position, the Court relies

on decisions from at least ten other states, which hold that a plaintiff's criminal conduct is solely responsible for the fine, prison sentence, or social stigma resulting from his or her conviction.

...none of those cases would the allegations of malpractice, if true, conclusively have established that the former criminal defendant would have avoided conviction but for the attorney's malpractice.

...1. Despite the Court's holding regarding Peeler's causes of action for negligence and violations of the Texas Deceptive Trace Practices-Consumer Protection Act ("DTPA"), Tex.Bus. & Com.Code §§ 17.41-.63, she still might have had a remedy against Jordan and Hughes & Luce had she pursued on appeal her claims sounding in contract. Since causation is not an element of a contract or restitution claim, I would not construe anything in the Court's opinion to prevent a convicted former client from recovering against an attorney on those grounds. *See Bailey v. Tucker*, 533 Pa. 237, 621 A.2d 108, 115 (1993). As the court of appeals notes, making post-conviction relief a prerequisite to recovery in negligence or under the DTPA does not preclude a convict from recovering against a former attorney for breach of contract or in restitution. 868 S.W.2d 823, 833. Indeed, the court in *Bailey* concluded that a suit sounding in contract rather than tort would both permit redress for the malfeasance of which Peeler accuses Jordan and Hughes & Luce and prevent criminals from profiting from their wrongdoing. 621 A.2d at 115.

LLOYD E. HUMPHREYS	)	IN THE DISTRICT
	)	COURT
AND HUMPHREYS &	)	
ASSOCIATES LAW FIRM, P.C.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	TARRANT COUNTY,
	)	TEXAS
	)	
	)	
CHARLES MEADOWS AND	)	
MAX WAYMAN	)	
	)	
Defendants.	)	67th JUDICIAL DISTRICT

AFFIDAVIT OF CHARLES M. MEADOWS, JR.

1. My name is Charles M. Meadows, Jr. I am over the age of eighteen (18) years of age, of sound mind, am fully competent to make this affidavit. I have never been convicted of a crime. I have personal knowledge of each of the facts stated herein and they are all true and correct.
2. At no time was I ever retained as an attorney to represent Humphreys & Associates Law Firm, P.C. in any criminal proceeding or legal matter. There was no contractual relationship ever established between Humphreys & Associates Law Firm, P.C. and me. I have never represented Humphreys & Associates Law Firm, P.C. or purported to have represented this company at any time.
3. I did represent Lloyd E. Humphreys after the conclusion of his criminal case in the United States District Court in Iowa. Mr. Humphreys sentencing hearing...relationship between Mr. Humphreys and me ended November 4, 1991.

SUBSCRIBED AND SWORN TO BEFORE ME, on this 8th day of June, 1998.

MAX, WAYMAN
& ASSOCIATES, INC.
Criminal Tax Consulting Financial Investigations
Representation before IRS Examination & Collection Divisions
Post Office Box 1062 * Fort Worth, Texas * 817-335-3135

August 27, 1991

Mr. Charles M. Meadows, Jr., Attorney
Meadows, Owens, Collier, Reed & Coggins
3700 NCNB Plaza
901 Main Street
Dallas, Texas 75202

In Re: Lloyd E. Humphreys

Enclosed please find an invoice for services rendered relating to Lloyd E. Humphreys matter....

Sincerely,

/s/ Max Wayman
Max M. Wayman

August 1 — Traveled to the offices of Attorney Meadows for continued trial preparation and contact various witnesses.

August 2 — Traveled to the offices of Attorney Meadows for continued trial preparation.

August 4 — Traveled to Cedar Rapids, Iowa. Via TWA, in preparation for trial.

August 5 — Pre-trial preparation.

August 6 — Pre-trial preparation.

August 7 — Attendance and involvement in trial.

August 8 — Attendance and involvement in trial.

August 9 — Attendance and involvement in trial.
Return travel to Dallas/Fort Worth via American Airlines from Cedar Rapids, Iowa.

August 12 — Traveled to Cedar Rapids, Iowa, via TWA in order to attend trial.

Obtained address and telephone number information regarding Floyd Heskett.

Telephone conversations with investigating sources to investigate the driving and criminal history of Floyd J. Heskett.

August 13 — Attendance and involvement in trial.

August 14	Attendance and involvement in trial.
August 15	Attendance and involvement in trial.
August 16	Attendance and involvement in trial.
	Return travel to Dallas/Fort Worth from Cedar Rapids, Iowa.
Total Due	$7779.23

ELEVEN COMPLETE CASE CITATIONS IN SEVEN CATEGORIES OF UNITED STATES DIFFERENT POSITIONS AS TO MALPRACTICE CLAIMS AGAINST CRIMINAL DEFENSE LAWYERS.

I. STATES FOLLOWING TRADITIONAL COMMON LAW STANDARDS: (26 states and United States Supreme Court)

1. 1.U.S. Supreme Court, Ferri v. Ackerman, 494 US 193, 62 L.Ed2d 356, 100 S.Ct. 402 (9179)
2. California see, *Holiday v. Jones*, 251 CAL App 3d 102, 264 Cal Rptr 448 (1989); *Martin v. Hall*, 20 Cal App. 3d 419, 97 Cal Rptr 730 (1971).
3. Iowa see, *Baker v. Pearl*, 225 NW2d 106 (Iowa 1975)
4. Ohio see, *Canady v. Shwartz*, 577 NE2d 437 (1989) (on remand rejected on other grounds, Lexis 1284, (1990), *Krahn v. Kinney*, 538 NE2d 1058 (1989).
5. Kansas see, *Bowman v. Doherty*, 686 P2d 112 (1984).
6. Louisiana see, *Geddie v. St. Paul Fire & Marine Ins.*, 354 So2d 718, (LA App 4th 1978), cert den. 356 So2d 1011).
7. New Jersey see, *Snyder v. Baumecker*, 708 F.Supp 1451, (1989 D.D. N.J.), *Lawson v. Nugent*, 702 F.Supp 91 (D. N.J. 1988).
8. North Dakota see, *Klem v. Greenwood*, 450 NW2d 738 (1990).
9. Tennessee see, *Sammons v. Rotroff*, 653 SW2d 740, (1983 Tenn App), cert den. 464 US 860, 78 L Ed2d 165, 104 S.Ct 186, *Moultrie v. State*, 542 SW2d 835.
10. Mississippi see, *Singleton v. Steggall*, 580 So2d 1242 (1991)
11. States in accord with no recent cases to the contrary: Arkansas, Arizona, Idaho, Kentucky, Maine, Maryland, New Hampshire, New Mexico, Nevada, Montana, South Carolina, Washington, West Virginia, Virginia, Wisconsin, Wyoming, Vermont.

II A)REQUIRE CRIMINAL MALPRACTICE PLAINTIFFS PLEAD AND PROVE ACTUAL INNOCENCE; NOT NECESSARY TO EXONERATE ON APPEAL OR POST CONVICTION RELIEF:

1. Alabama see, *Streeter v. Young*, 583 So2d 1339 (1991)
2. Hines v. Davidson, 489 So2d 532 (1986).
3. Georgia see, Hogan v. Peters, 353 S.E.2d 601 (1987).
4. Illinois see, Sullivan v. Wiener, No 88-C6813, 1989 WL 65163 (ND Ill. 1989).
5. Massachusetts see, Glen v. Aiken, 569 NE2d 783 (Mass 1991) but see, Wagenmann v. Adams, 829 F2d 196 (1987 CA1 MASS).
6. New York see, Carmel v. Lunney, 511 NE2d 1126 (NY 1987), Claudio v. Heller, 119 Misc 2d 432, 463 NY S2d 155 (1983-1st case in US to look at issue.)
7. Pennsylvania see, Bailey v. Tucker, 621 A2d 108 (PA 1993).

II B)CONTRA HOLDING-"ACTUAL GUILT" IS AFFIRMATIVE DEFENSE TO BE PROVED BY CRIMINAL DEFENSE LAWYER DEFENDANT IN MALPRACTICE CASE:

1. Alaska see, Shaw v. State, 861 P2d 1358, (Alaska 1991)

III. COLLATERAL ESTOPPEL:

1. Alabama see, Tyree v. Hendrix, 480 So2d 1176 (1985).
2. California see, Weiner v. Mitchell, Silberberg & Knupp, 170 Cal Rptr. 533 (Cal App 1981).

3. Connecticut see, Schiff v. Williams, Lexis 305 (Conn 1991) (but "only if full and fair opportunity to litigate negligence".)
4. District of Colombia see, McCord v. Bailey, 636 F2d 606 (D.C. Cir 1990), Bigelow v. Knight, 737 F.Supp 669 (1990).
5. Florida see, Zeidwig v. Ward, 548 So2d 209 (FL 1989).
6. Michigan see, Schlumm v. O'Hagan, 433 NW2d 839, (MI Ct. App. 1988).
7. New York see, Rastelli v. Sutter et al, 449 NY S2d 305 (1982).
8. Pennsylvania see, Alberici v. Tinari, 542 A2d 127 (1988).
9. Texas see, Garcia v. Ray, 556 SW2d 870 (TX Civ App-Corpus Christi 1977).
10. Utah see, Heathman v. Hatch, 372 P2d 990 (1962).

IV. GUILTY PLEA IN CRIMINAL ACTION BARS:

1. Colorado see, Pearson v. Sublette, 730 P2d 909 (1986 Co. App.)
2. Indiana see, *Hockett v. Breunig*, 526 NE2d 995 (1988).
3. Georgia see, *Johnson v. Butcher*, 301 SE2d 665 (1983).
4. Michigan see, *Schlumm v. O'Hagan P.C.*, 433 NW2d 839 (1988).
5. Missouri see, *State Ex Rel O'Blennis v. Adolf*, 691 SW2d 498 (1985 MO. App.)
6. New York, see *Carmel v. Lunney*, 511 NE2d 1126 (1987).
7. South Dakota see, *Myers v. Butler*, 556 F2d 398 (1977 C.A. 8 S.D.), cert den. 434 US 956, 54 L.Ed2d 314, 985. Ct. 483.
8. Texas see, *Peeler v. Hughes & Luce*, 909 SW2d 494 (1995) (no holding on other causes of action – excluded breach of contract and fiduciary duty.)

V. **DEFENSE COUNSELS REASONABLE EXERCISE OF PROFESSIONAL JUDGMENT OR GOOD FAITH MISTAKE BARS MALPRACTICE ACTION:**

1. Minnesota see, *Wartnick v. Moss & Barnett*, 476 NW2d 166 (1991 Minn App.).
2. Oklahoma see *Waubaunsee v. Harris*, 610 P2d 782 (1980).
3. Texas see, *Great American Indemnity Co. v. Dabney*, 128 SW2d 496 (TX App.-Amarrillo 1939), *Cook v. Iron*, 409 SW2d 475 (TX App-Amarillo 1966), *State v. Baker*, 539 SW2d 367 (TX App.-Austin 1976).

VI. **A. OUTRIGHT IMMUNITY:**

1. Delaware see, *Browne v. Robb*, 583 A2d 949, cert. Den. 113 L.Ed2d 477 111 S.Ct. 1425 (1990) (State statute Ct. Appt. defense attorney immune.)
2. Florida see, *Sullens v. Carroll*, 446 F2d 1392 (CA 5, 1971).
3. North Carolina see, *Jones v. Warlick*, 364 F2d 828 (1966 CA 4 NC).
4. Texas see, OUR CASE!!!

3. Oregon see, *Stevens v. Bispham*, 851 P2d 556 (OR 1993), but see Kirkland v. Mannis, 639 P2d 67 (1982).
4. Missouri see, Johnson v. Schmitt 719 SW2d 825, but see, Jepson v. Stubbs, 555 SW2d 307 (MO 1977).
5. Texas see, Peeler v. Hughes & Luce, 909 SW2d 494 (TX 1995) (guilty plea, no holding on other causes of action-breach of fiduciary duty, contracts etc., limited to negligence malpractice claim by guilty pleading plaintiff.) (Prior to extension in our case.)

IX. **NOT NECESSARY TO ALLEGE REVERSAL OF CONVICTION:**

1. Ohio see, Krahn v. Kinney, 538 NE2d 1058 (Ohio 1989), Canady v. Shwartz, 577 NE2d 437 (Ohio 1989), Downton v. Vandemark, 571 F.Supp. 40 (N.D. Ohio 1983), De Brosse v. Jamison, Lexis 131 (Ohio App-Miami Co. 1992).
2. Pennsylvania see, Ei Bon Ee Baya Ghananee v. Black, 504 A2d 281 (1986), Auick v. Swem, 568 A2d 223 (1989).